BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIMBERLY BUTLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,369
DG RETAIL, LLC	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the April 14, 2011, preliminary hearing Order For Compensation of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded temporary total disability compensation (TTD) commencing September 18, 2009, to October 29, 2009, after the ALJ found that claimant had suffered a series of accidental injuries which arose out of and in the course of her employment with respondent and timely notice of the accidents was provided. The date of accident was determined to be June 29, 2010.

Respondent also requests a stay of the April 14, 2011, Order Referring Claimant For Independent Medical Evaluation of the ALJ which referred claimant to Pat D. Do, M.D., for an independent medical examination (IME) and for any recommendations the doctor would make regarding any additional medical treatment that is needed to cure and relieve claimant of the effects of the June 29, 2010, accidental injury to claimant's back. The doctor was further ordered to render an opinion regarding whether claimant's duties at work caused, aggravated or accelerated claimant's back symptoms.

Claimant appeared by her attorney, Bruce Alan Brumley of Topeka, Kansas. Respondent appeared by its attorney, John A. Pazell of Lenexa, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the discovery deposition of Kimberly Butler taken August 27, 2010; the discovery deposition of Ann Wise taken October 1, 2010, with attachments; the evidentiary deposition of Mary Morgan taken March 3, 2011; the evidentiary deposition of Lacy Erickson taken March 3, 2011; the transcript of Preliminary Hearing held April 14, 2011, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Respondent argues that claimant's claim of a work-related injury or a series of injuries is not supported by this record. Claimant failed to mention that her back complaints were connected to the extra work she performed during the preparation for a visit from the corporate offices. Claimant argues that she discussed her ongoing pain in her low back and legs with her supervisors on several occasions as they worked the longer hours performing the extra cleaning duties in preparation for the corporate visit.

2. Did the ALJ exceed his jurisdiction in ordering the payment of temporary total disability compensation (TTD) from the preliminary hearing when no TTD was requested prior to the hearing, in violation of K.S.A. 44-534a(a)(1)?

3. Should the ALJ's Order Referring Claimant For Independent Medical Evaluation, issued on April 14, 2011, be stayed pending the outcome of claimant's appeal from the companion Order For Compensation issued on the same date? Does the Appeals Board have the jurisdiction to determine this issue on an appeal from a preliminary hearing order?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Compensation and the Order Referring Claimant For Independent Medical Evaluation should be affirmed.

Claimant began working for respondent on January 4, 2009, as a cashier in its Baldwin City (Kansas) store. By March or May, she was promoted to third key. This also allowed claimant to open and close the store, and placed her in charge of counting money and handling deposits. Claimant's job duties included running the cash register, stocking shelves, unloading trucks and helping keep the store clean. These job duties involved lifting from a few ounces up to 50 pounds.

In August 2009, claimant and the store staff were notified that a corporate visit was planned for the first part of September. For approximately three weeks leading up to the September 5, 2009, corporate visit, claimant and the rest of respondent's staff worked cleaning, reorganizing and moving stock to make the store as presentable as possible. During the week ending on September 4, 2009, claimant worked 73 hours. On Saturday, September 5, 2009, the date of the corporate visit, claimant worked for 12.15 hours.

Claimant testified that she first experienced symptoms in her right calf sometime in July 2009. She thought it was a charlie horse and sought no medical treatment. As the time for the corporate visit approached, and the work hours increased, claimant began

experiencing additional problems in both legs and in her low back. The long work hours and the heavy lifting leading up to the corporate visit made claimant hurt more.

Claimant advised her immediate supervisor, Anna Wise,[1] the store manager, that she was experiencing pain. Ms. Wise acknowledged the complaints, but explained that the extra work was causing all of the employees to experience added pain. Several of the employees kept pain medication at the store. Ms. Wise also acknowledged that claimant complained of back pain and stated that she needed to see a doctor. However, Ms. Wise testified that claimant said the pain was the result of an automobile accident suffered several years before. Up to and including September 5, 2009, claimant had worked 13 days in a row. Claimant then worked on September 6, 7 and 8 before going to the doctor.

Claimant first sought medical treatment with Vadim Braslavsky, M.D., on September 9, 2009. At that time she complained of pain of the bilateral buttocks, with the pain duration being three months, worse within the last month. Claimant denied any injury. However, an Affidavit from Laura Brady, from the office of Dr. Braslavsky, filed with the Division, stated that claimant discussed her injuries as being work related. But claimant was reluctant to claim such for fear of termination.[2] Claimant was diagnosed with degenerative disc disease at L5-S1 and bilateral sciatic neuralgia. Claimant was placed on light duty. Claimant's last day of regular work was September 8, 2009. When she brought the light duty restrictions back to respondent, they were initially honored. However, on September 18, 2009, claimant had a meeting with Ms. Wise and James Funk, respondent's district manager. Claimant was advised that she did not qualify for light duty work for a non-work-related injury. Claimant advised that she wanted to claim workers compensation, but this was denied, as claimant had failed to report a work injury within 24 hours. Ms. Wise acknowledged that this was per company policy. Claimant was told that she had to claim FMLA, which she did for about six weeks.

Lacy Erickson, one of claimant's supervisors and respondent's assistant manager, testified regarding the pre-corporate cleanup. Ms. Erickson described the work as being difficult, saying the job was "almost unbearable".[3] All the workers were taking pain medications, with claimant using ibuprofen. She remembers claimant mentioning leg pain. However, claimant never came to her to claim a work injury. Ms. Erickson testified that both Ms. Wise and Mr. Funk were aware that the extra work, including the lifting, was

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[1] Ms. Wise testified at her deposition that her first name is Anna, but the cover page of the deposition transcript says Ann.

[2] P.H. Trans., Cl. Ex. 2.

[3] Erickson Depo. at 18.

causing the employees to experience pain. Ms. Erickson acknowledged that the pain usually went away after work, but this pain stayed.[4]

Mary Morgan was a part-time cashier who was later promoted to third key and was assistant manager when deposed on March 3, 2011. She worked with claimant during the pre-corporate cleanup. She agreed that the workers were in pain during the cleanup, with 60- to 70-hour weeks being common. Claimant discussed the fact that she had sciatica from a prior car wreck and discussed the ongoing back pain during the clean up on several occasions. The day after the corporate visit, September 6, 2009, claimant stated that she had pain in her back. At one point, claimant could not stand up straight and could not lift a box. Ms. Morgan stated that claimant was worse after the corporate visit.

Claimant was terminated from her job with respondent on December 9, 2009, after respondent's representatives alleged that the deposits by claimant from respondent to the bank were not accurate.

Claimant was referred by her attorney to internal medicine specialist Daniel D. Zimmerman, M.D., on September 9, 2010. Claimant was diagnosed with degeneration at L4-5, a moderate to large central disc protrusion at L4-5 based on the MRI of October 1, 2009, pain and discomfort affecting the lumbar spine and radicular symptoms in the lower extremities, greater on the right. X-rays indicated disc space narrowing at L4-5 and L5-S1. Dr. Zimmerman determined that claimant's symptoms were the result of the work performed for respondent leading up to the corporate visit on September 5, 2009.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

[4] Id. at 30.

[5] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

It is uncontradicted that claimant and the rest of respondent's staff were required to increase their hours and workload leading up to the corporate visit on September 5, 2009, with 60- to 70-hour weeks being common. Claimant displayed signs of back pain and expressed pain complaints to her co-workers and supervisors. Claimant was experiencing back pain and leg pain during this time. She sought medical treatment within 4 days of the corporate visit and was diagnosed with degenerative disc disease and sciatica. It is understood that claimant initially denied a work-related connection to these complaints. However, she also expressed fear of termination if she claimed a work connection. This Board Member finds that claimant has satisfied her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent, with the injury being to her low back and lower extremities.

K.S.A. 44-534a states, in part:

> (a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the

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[7] K.S.A. 2009 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.[9]

Respondent contends that the ALJ exceeded his jurisdiction in awarding TTD from the preliminary hearing as claimant acknowledged on the record that she was not seeking TTD at the time of the preliminary hearing. However, at the preliminary hearing, claimant amended her claim, adding TTD as a sought-after benefit. This amendment, made on the record, raised no objection by respondent.[10] Additionally, claimant's initial certified letter of June 18, 2010, discussed both the need for medical treatment and TTD as the sought-after benefits. This Board Member finds that claimant initially raised the request for TTD in the written notice required by K.S.A. 44-534a(a)(1). Additionally, the request for TTD was raised and added as an issue and sought-after benefit at the preliminary hearing with no objection raised by respondent. The ALJ did not exceed his jurisdiction in awarding TTD benefits from the preliminary hearing of April 14, 2011.

Finally, respondent contends that the Order Referring Claimant For Independent Medical Evaluation issued April 14, 2011, should be stayed pending this appeal. As this Board Member has found that claimant did suffer personal injury by accident which arose out of and in the course of respondent's employment, this issue is rendered moot.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The Order For Compensation and the Order Referring Claimant For Independent Medical Evaluation issued on April 14, 2011, are affirmed.

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[9] K.S.A. 44-534a(a)(1).

[10] P.H. Trans. at 60.

[11] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated April 14, 2011, and the Order Referring Claimant For Independent Medical Evaluation of Judge Avery dated April 14, 2011, should be, and are hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2011.

HONORABLE GARY M. KORTE

c: Bruce Alan Brumley, Attorney for Claimant
John A. Pazell, Attorney for Respondent
Brad E. Avery, Administrative Law Judge